Galuseh @ Norizan bt Jalin (representing the estate of Luhimboi bt Bahindok, deceased) v Jemro @ Jimbih Sangin & Ors

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-21–24/2 OF 2012
LEE HENG CHEONG JC
29 OCTOBER 2012

Civil Procedure — Limitation — Recovery of land — Allegation of fraud — Accrual of limitation period — Plaintiff's right of action accrued upon her knowledge that land was actually transferred to second defendant — Whether plaintiff's claim against defendants were caught by relevant limitation periods — Whether plaintiff's action against defendants ought to be struck out — Limitation Ordinance (Sabah Cap 72) Items 102, 103 & 112 — Rules of the High Court 1980 O 18 r 19

Civil Procedure — Locus standi — Recovery of land — Right of action for — Whether plaintiff had registrable interest in land — Whether plaintiff duly appointed as lawful administratrix of estate of person who had registrable interest in said land

A piece of land measuring 3.47 acres was alienated to one Waimi bin Salian in 1985 and later 2 acres of the land (the said land) was transferred to the first defendant while 1.47 acres to one, Mohammed Dali bin Jaafar. The first defendant sold the said land to the plaintiff's late mother. As the title deed was then in the process of being subdivided, the transfer form could not be registered as yet at the material time. Nevertheless, the plaintiff was given possession of the said land sometime in 1988 and had occupied and cultivated the said land until the trial. Sometime in March 1991, the plaintiff was informed that the said land had been transferred to the second defendant. The plaintiff's late mother's then solicitors requested for a collector's caveat to be lodged against the said land, to prevent improper dealing of the said land which was accordingly registered and entered. Upon application by the second defendant, the collector's caveat was later withdrawn by the third defendant despite making a finding of facts that the collector's caveat was entered and/or registered to protect the interest of the plaintiff's late mother in the said land due to fraud or breach of trust committed by the first defendant. Dissatisfied, the plaintiff appealed on behalf of her late mother to the Director of Lands and Surveys Department ('director') but unfortunately the director upheld the decision of the collector. The plaintiff proceeded to appeal to the High Court against the decision of the director which was subsequently withdrawn by

consent. Instead, this application was filed by the plaintiff for a declaration that at all material time the first defendant held the said land on trust for the benefit of the plaintiff pending registration of the transfer of the said land to her name based on the memorandum of transfer executed by the first defendant. The plaintiff also sought a declaration that the transfer of the said land by the first defendant to the second defendant was null and void and liable to be set aside. The first, second and third defendants are contending in essence that the plaintiff's claim was time barred pursuant to the Limitation Ordinance whereby the plaintiff failed to commence action against the respective defendants, inside the 12 years' limitation period and/or the three years' period against the third defendant under the Public Authorities Protection Act 1948 and/or against the first defendant on the allegation of fraud inside the three years limitation period. Further, the second and third defendants contended that since the plaintiff's late mother was not the registered owner of the said land thus she had no locus standi or authority to give the authorisation (surat kuasa) as per exh GBHJ2 to the plaintiff to occupy and cultivate the said land.

Held, dismissing the plaintiff's claim with costs:

(1) It was in evidence that the plaintiff, or rather the plaintiff's late mother claimed that she first came to know that the said land which the plaintiff's late mother had allegedly bought from the first defendant, was actually transferred to the second defendant sometime in March 1991. The plaintiff's late mother by her solicitor's letter dated the 15 April 1994 to the Assistant Collector Land Revenue, Ranau, had undertaken shortly thereafter to commence court proceedings against the relevant parties for the recovery of the said land. The plaintiff's right of action for recovery of the said land first accrued to her upon her knowledge that the said land which she had allegedly bought from the first defendant, was actually transferred to the second defendant (see para 11).

(2) The limitation period for the commencement of action for recovery of the said land, or for possession of immovable property or any interest therein not specifically mentioned, or for relief on the ground of fraud either for a declaration that the forgery of an instrument or to set aside an instrument perpetrated by fraud under s 3, Part V, Items 102, 103 and 112 of the Limitation Ordinance (Cap 72), is 12 years and had since expired as the plaintiff only filed this action in the year 2012 (see para 14).

(3) Further, the plaintiff had no locus standi to commence this suit against the second defendant as she was not the lawful court appointed administratrix of the estate of the deceased person whom she purported to represent. The plaintiff had no registrable interest in the said land and therefore she has no right of action for recovery of the said land unless she is duly appointed as the lawful administratrix of the estate of the person who has a registrable interest in the said land (see paras 15 & 17).

[Bahasa Malaysia summary

Pada tahun 1985, sebidang tanah seluas 3.47 ekar milik Waimi bin Salian dan kemudian dua ekar tanah ('tanah tersebut') telah dipindah milik kepada defendan pertama manakala 1.47 ekar kepada Mohammed Dali bin Jaafar. Defendan pertama telah menjual tanah tersebut kepada mendiang ibu plaintif. Oleh kerana surat ikatan milikan dalam proses untuk dipecah bahagikan, borang pindah milik tidak boleh didaftarkan lagi pada masa material. Walau bagaimanapun, plaintif telah diberi milikan tanah sekitar tahun 1988 dan telah menduduki dan menjalankan pertanian di tanah tersebut sehingga perbicaraan. Sekitar Mac 1991, plaintif telah dimaklumkan bahawa tanah tersebut telah dipindahkan kepada defendan kedua. Peguamcara mendiang ibu plaintif ketika itu meminta agar kaveat pemungut dimasukkan ke atas tanah tersebut untuk mengelakkan urusan tidak wajar tanah tersebut yang didaftarkan dan dimasukkan sewajarnya. Dengan permohonan defendan kedua, kaveat pemungut tersebut kemudiannya ditarik balik oleh defendan ketiga walaupun membuat suatu dapatan fakta bahawa kaveat pemungut dimasukkan dan/atau didaftarkan untuk melindungi kepentingan mendiang ibu plaintif dalam tanah tersebut disebabkan oleh penipuan atau pecah amanah oleh defendan pertama. Tidak berpuas hati, plaintif merayu kepada Pengarah Jabatan Tanah dan Ukur ('pengarah') bagi pihak mendiang ibunya tetapi malangnya, pengarah mengekalkan keputusan pemungut. Plaintif seterusnya merayu kepada Mahkamah Tinggi terhadap keputusan pengarah yang kemudiannya ditarik balik dengan izin. Permohonan ini telah difailkan oleh plaintif bagi suatu perisytiharan bahawa pada masa material, defendan pertama memegang tanah tersebut atas amanah bagi manfaat plaintif sementara mendaftarkan pindah milik tanah tersebut ke atas namanya berdasarkan memorandum pindah milik yang disempurnakan oleh defendan pertama. Plaintif juga memohon satu pengisytiharan bahawa pindah milik tanah oleh defendan pertama kepada defendan kedua batal dan tidak sah serta wajar diketepikan. Defendan pertama, kedua dan ketiga menghujahkan, pada dasarnya, bahawa tuntutan plaintif terhalang oleh had masa menurut Ordinan Had Masa yang mana plaintif gagal untuk memulakan tindakan terhadap setiap defendan, dalam tempoh had 12 tahun dan/atau tiga tahun terhadap defendan ketiga di bawah Akta Perlindungan Pihak Berkuasa Awam 1948 dan/atau terhadap defendan pertama bagi dakwaan penipuan dalam tempoh had tiga tahun tersebut. Seterusnya, defendan kedua dan ketiga menegaskan bahawa memandangkan mendiang ibu plaintif bukan pemilik berdaftar tanah tersebut, dia tidak mempunyai locus standi atau kuasa untuk memberikan kebenaran (surat kuasa), menurut eksh GBHJ2, kepada plaintif untuk menduduki dan menjalankan pertanian di tanah tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Adalah menjadi bukti bahawa plaintif, atau mendiang ibu plaintif mendakwa bahawa dia mengetahui bahawa tanah yang didakwa dibeli

oleh mendiang ibu plaintif daripada defendan pertama, sebenarnya telah dipindah milik kepada defendan kedua sekitar Mac 1991. Mendiang ibu plaintif melalui surat bertarikh 15 April 1994 kepada Penolong Pemungut Hasil Tanah, Ranau, telah mengaku janji sejurus selepas itu untuk memulakan prosiding mahkamah terhadap pihak-pihak yang berkaitan untuk mendapatkan kembali tanah tersebut. Hak kausa tindakan plaintif untuk mendapatkan semula tanah tersebut mula terakru dengan pengetahuan bahawa tanah yang didakwa dibeli daripada defendan pertama tersebut, sebenarnya telah dipindah milik kepada defendan kedua (lihat perenggan 11).

(2) Tempoh had masa bermulanya tindakan untuk mendapatkan semula tanah tersebut, atau untuk milikan harta tak alih atau apa-apa kepentingan di dalamnya yang tidak disebut secara khusus, atau bagi relief atas alasan penipuan sama ada untuk suatu perisytiharan bahawa pemalsuan instrumen atau untuk mengetepikan instrumen akibat suatu penipuan di bawah s 3, Bahagian V, Item 102, 103 dan 112 Ordinan Had Masa, adalah 12 tahun dan telah tamat kerana plaintif hanya memfailkan tindakan ini pada tahun 2012 (lihat perenggan 14).

(3) Plaintif tidak mempunyai locus standi untuk memulakan saman ini terhadap defendan kedua kerana ia bukan mahkamah yang sah yang melantik pentadbir harta pusaka si mati yang konon diwakili. Plaintif tidak mempunyai kepentingan berdaftar ke atas tanah tersebut dan oleh itu dia tidak mempunyai hak tindakan bagi mendapatkan tanah tersebut melainkan jika dia telah dilantik sebagai pentadbir sah di sisi undang-undang harta pusaka bagi orang yang mempunyai kepentingan berdaftar ke atas tanah tersebut (lihat perenggan 15 & 17).]

Legislation referred to

Limitation Ordinance (Sabah Cap 72) ss 3 Part III, 9 Part V, Items 77, 102, 103, 112

Public Authorities Protection Act 1948

Rules of the High Court 1980 O 14A, O 18 r 19, 19(1)(a), (b), (c), (d)

Trever Maringking (Maringking & Co) for the plaintiff.
(Michael Ubu & Co) for the first defendant.
Paul Chin (Paul Chin & Co) for the second defendant.
Nor Azieh (Sabah State Counsel) for the third defendant.

Lee Heng Cheong JC:

GROUNDS OF DECISION (IN RESPECT ENCLS 18–19 AND 22)

INTRODUCTION

[1] The background of the land in dispute is as follows:

(a) a piece of land measuring 3.47 acres was alienated to one Waimi bin

Salian in 1985 and later 2 acres of the land ('the said land') was transferred to the first defendant while 1.47 acres to one, Mohammed Dali bin Jaafar;

(b) the first defendant sold the said land to the plaintiff's late mother and in a statutory declaration dated 20 June 1988, the first defendant declared that he had received full payment of the purchase price and no longer had any interest on the said land;

(c) on 25 June 1988 the first defendant also executed a memorandum of transfer at the office of the third defendant, witnessed by one Mr Yakin Sinit to transfer the said land to the plaintiff's late mother but as the title deed was then in the process of being subdivided, the transfer form could not be registered as yet then;

(d) on 17 July 1988, the plaintiff wrote to the former owner asking for delivery of vacant possession of the said land within one month thereof and accordingly the plaintiff was given possession and thereafter occupied and cultivated the said land until to date;

(e) when the plaintiff made a follow up check with the third defendant's office concerning the subdivision sometime in March 1991, the plaintiff was informed that the said land had been transferred to the second defendant. The plaintiff immediately wrote a letter to the third defendant to get confirmation of the same;

(f) meanwhile a private caveat was lodged against the said land and a notice thereof was given to the second defendant. By a letter dated 14 June 1991 the third defendant informed the plaintiff's late mother that the first defendant had met with him and after discussion, the first defendant offered to pay RM6,000 only with interest of 7% a year to the plaintiff's late mother which offer was not accepted;

(g) on 15 April 1994 the plaintiff's late mother's then solicitors requested for a collector's caveat to be lodged against the said land, to prevent improper dealing of the said land which was accordingly registered and entered under Memorial No 00009549;

(h) upon application by the second defendant, the collector's caveat was later withdrawn by the third defendant despite making a finding of facts that the collector's caveat was entered and/or registered to protect the interest of the plaintiff's late mother in the said land due to fraud or breach of trust committed by the first defendant;

(i) dissatisfied, the plaintiff appealed on behalf of her late mother to the director of lands and surveys department but unfortunately the director upholds the decision of the collector; and

(j) the plaintiff proceeded to appealed to the High Court against the

decision of the director of lands and surveys department and at the hearing counsels for the respective parties agreed and informed the court that the appeal shall be withdrawn by consent and that instead a writ of summons shall be filed within 14 days.

THE THREE APPLICATIONS

[2] Enclosure 22 was filed by the first defendant and made under O 14A of the Rules of the High Court 1980, encl 19 was filed by the second defendant and encl 18 was filed by the third defendant and both applications are made under O 18 r 19 of the Rules of High Court 1980.

ENCLOSURES 18–19

[3] These are the second and third defendants' applications taken out pursuant to O 18 r 19(1)(a)–(d) of the Rules of the High Court 1980 for an order that action herein by the plaintiff against the second defendant be struck out and/or dismissed with costs on the ground that it discloses no reasonable cause of action and/or it is scandalous, frivolous and vexatious, and/or it may prejudice and embarrasses the fair trial of the action and/or it otherwise is an abuse of the process of court.

[4] Enclosures 18–19 are grounded on whether the plaintiff's action herein against the second and third defendants is statue-barred, and whether the plaintiff has locus standi to commence this suit against the second and third defendants.

ENCLOSURE 22

[5] This is an application by the first defendant under O 14A seeking determination by this court on the following questions:

(a) given that the plaintiff's entire claims is based and hinges on allegation of fraud, whether the plaintiff's claim is time barred pursuant to s 3 Part III, Item 77 of the Limitation Ordinance (Sabah Cap 72) (Question 1); and

(b) whether the plaintiff has locus standi towards the land and to commence the proceedings against the first defendant as neither the plaintiff and/or the deceased person has registrable interest on the said land nor has the plaintiff's lawful court appointed administratrix of the estate of the deceased person whom she purports to represent.

A COMMON GROUNDS

[6] The common grounds of all three applications are the issues of limitation and locus standi.

B CONSIDERATION OF THE ISSUE OF LIMITATION

[7] The first, second and third defendants are contending in essence that the plaintiff's claim is time barred pursuant to the Limitation Ordinance whereby the plaintiff failed to commence action against the respective defendants, inside the 12 years' limitation period and/or the three years' period against the third defendant under the Public Authorities Protection Act 1948 and/or against the first defendant on the allegation of fraud inside the three years limitation period.

[8] In her statement of claim, the relief prayed for by the plaintiff are, inter alia, for the following declarations:

(a) A declaration that at all material time the first defendant held the said land on trust for the benefit of the plaintiff pending registration of the transfer of the said land to her name based on the memorandum of transfer executed by the first defendant; and

(b) A declaration that the transfer of the said land by the first defendant to the second defendant is null and void and liable to be set aside since at all material time the first defendant held the said land on trust for the benefit of the plaintiff pending registration of the transfer of the said land to her name.

[9] Notwithstanding that the plaintiff is seeking declaratory relief based on the doctrine of trust and reliance on s 9 of the Limitation Ordinance (Sabah Cap 72) which provides as follows:

> 9 Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time.

[10] I find that although the plaintiff and/or her deceased mother's claims or prayers are based on trust, it is in fact grounded on fraud.

[11] I find that the plaintiff and/or the plaintiff's deceased mother cannot have two bites at the cherry as the plaintiff and/or the plaintiff's deceased mother's claim is caught by the other provisions of the said Limitation

Ordinance as the plaintiff's deceased mother and/or her solicitor was fully aware of her claim since the year 1994, when the plaintiff's deceased mother's solicitor in a letter dated 14 April 1994, to the Assistant Collector Land Revenue, Ranau, stated 'We have been instructed to institute civil proceedings against the seller in the High Court, Kota Kinabalu' (refer to para 8 of the said letter, exh GBHJ11). The plaintiff and/or the plaintiff's deceased mother only filed this claim on 13 February 2012.

[12] As regards the plaintiff's contention that the period for limitation only commence in 2012 as the time for limitation to run was postponed to 2012, due to the fact that a collector's caveat has been lodged against the said land. I find that this contention has no merits as the lodgement of a collector's caveat does not stop the operation of the limitation period.

[13] It is in evidence that the plaintiff, or rather the plaintiff's late mother claimed that she first came to know that the said land which the plaintiff' late mother had allegedly bought from the first defendant, was actually transferred to the second defendant sometime in March 1991. The plaintiff's late mother had also by her solicitor's letter dated the 15 April 1994 to the ACLR Ranau, undertook to shortly thereafter to commence court proceedings against the relevant parties for the recovery of the said land (please refer exhibit marked as 'GEK2' of the second defendant's affidavit).

[14] I am in agreement with the plaintiff's contention that the plaintiff's right of action for recovery of the said land first accrued to her upon her knowledge that that the said land which she had allegedly bought from the first defendant, was actually transferred to the second defendant. The limitation period for the commencement of action for recovery of the said land, or for possession of immovable property or any interest therein not specifically mentioned, or for relief on the ground of fraud either for a declaration that the forgery of an instrument or to set aside an instrument perpetrated by fraud under s 3 Part V, Items 102-103 of the Limitation Ordinance (Sabah Cap 72) is 12 years and had since expired as the plaintiff only filed this action, in the year, 2012.

CONSIDERATION OF THE ISSUE OF LOCUS STANDI

[15] The second main issue relied by the first, second and third defendants is essentially that the plaintiff and/or the plaintiff's late mother has no locus standi in respect of the said land to commence the present suit as against the second and third defendants.

[16] The second and third defendants contended that the statutory declaration as per exh GBHJ1 was between one Gymunah bt Hj Jalin @ Noor

Jannah and the first defendant and since the plaintiff and/or the plaintiff's late mother are not named in the said statutory declaration, they have no locus standi towards the said land and to commence the present suit. The second and third defendants submitted that since the plaintiff's late mother was not the registered owner of the said land thus she has no locus standi or authority to give the authorisation/*surat kuasa* as per exh GBHJ2 to the plaintiff to occupy and cultivate the said land.

[17] I am also in agreement with the first, second and third defendants' contention that the plaintiff has no locus standi to commence this suit herein against the second defendant as she is not the lawful court appointed administratrix of the estate of the deceased person whom she purports to represent. The plaintiff has no registrable interest in the said land and therefore she has no right of action for recovery of the said land unless she is duly appointed as the lawful administratrix of the estate of the person who has a registrable interest in said land.

ORDER

[18] In the light of the above, I find that there are merits in all the three above enclosures. In essence I find that the plaintiff's claim against the three defendants are caught by the relevant limitation periods and also that the plaintiff did not have the necessary locus standi to initiate and maintain the action herein.

[19] In the premises I allow all the said three respective enclosures, with costs, to be taxed unless agreed.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed